

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL,
Petitioner,

v.

FRANK SANTELLA and
JOSEPH JECH,
Respondents.

DOCKET NUMBERS
HQ12149010026
HQ12149010027

DATE: SEP 21 1990

David J. Cortes, Esquire, Washington, D.C.
for the Special Counsel.

William L. Bransford, Esquire, Neill, Mullenholz &
Shaw, Washington, D.C., for the respondents.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board pursuant to an Order of the Board's Chief Administrative Law Judge (CALJ) dated August 3, 1990, granting respondent Jech's motion for certification of an interlocutory appeal on the issue of the Board's jurisdiction over him. The Special Counsel argues that jurisdiction attached when the complaint for disciplinary action was filed with the Clerk of the Board

pursuant to 5 U.S.C. § 1215(a)(1). Respondent Jech, however, argues that jurisdiction did not attach because the Special Counsel did not serve him with a copy of the complaint while he was still an employee.

Respondent Jech has filed a Motion to Expedite Consideration of Interlocutory Appeal or in the Alternative, to Stay the Hearing. Special Counsel does not oppose respondent's request except to the extent that respondent believes that a stay is necessary if a decision is not issued within four weeks rather than three weeks of trial. Respondent's motion to expedite is hereby GRANTED.

FACTS

On May 31, 1990, the Special Counsel filed, with the Clerk of the Board, a complaint for disciplinary action against respondents Jech and Santella charging them with four counts of violation of 5 U.S.C. § 2302(b)(8). The certificate of service accompanying the complaint states in relevant part that "on this date, May 31, 1990," a copy of the complaint was served by certified mail on Mr. Joseph Jech at 1244 Marls Court, Naperville, Illinois 60583. Case File, Tab 1. On June 1, 1990, respondent Jech retired from his Senior Executive position with the Internal Revenue Service. Affidavit of Joseph Jech, Case File, Tab 6. As of June 1, 1990, his residential address was in Lorton, Virginia but he planned to relocate to Illinois where he had previously resided. *Id.* On June 2, 1990, respondent Jech's brother notified Jech that a package had arrived for him by

Airborne Express. On June 5, 1990, respondent Jech received from his brother the Airborne Express package which contained the Special Counsel's Complaint for Disciplinary Action. *Id.* A day or two later respondent Jech received in the mail from the Board a copy of the Complaint which was sent by regular mail on June 5, 1990. Case File, Tab 6.

ANALYSIS

The Board's jurisdiction to adjudicate the complaint was established at the time the complaint was filed with the Board.

Section 1215(a)(1) of title 5 states, in relevant part, that where the Special Counsel determines that disciplinary action should be taken against an employee a written complaint against the employee should be prepared and presented to the employee and the Board.¹ By respondent Jech's own admission he was a federal employee on the date the complaint was filed with the Board. However, he claims that he is not subject to the Board's jurisdiction because he retired before the complaint was presented to him and therefore was no longer an employee within the meaning of the statute.

In *Special Counsel v. Owens*, 11 M.S.P.R. 128, 130 n.1 (1982) the Board stated that its jurisdiction to hear and

¹ The Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat 16 (1989), 5 U.S.C.A. §§ 1201-1206, 1211-1222, 2302(b)(8), 3352, and 7701(b) amended 5 U.S.C. § 1206(g) to incorporate the language of that section concerning the presentment of a complaint into a new section 1215(a).

decide a Special Counsel disciplinary action case attached at the time the complaint was filed and was not defeated by the respondent's subsequent resignation from the Federal service. The Owens' footnote, however, concerned a situation where an individual left Federal service after the complaint was both filed and served. Additionally, in Owens the Board found that one of three respondents was not an employee subject to the statute where he left Federal service before the Special Counsel's complaint was either filed or served. Thus, the question presented here, whether a Special Counsel disciplinary complaint must be served on an individual while that individual is still an employee, was not definitively decided in Owens. We now hold that 5 U.S.C. § 1215(a) does not establish such a requirement.²

In this regard we find apt an analogy to civil cases involving diversity of jurisdiction. In such cases, under the Federal Rules of Civil Procedure, jurisdiction turns on the facts existing at the time the suit commenced. Thus, the adverse parties must be citizens of different states at the time the complaint was filed. *Navarro v. Sav. Ass'n v. Lee*, 446 U.S. 458, 459, 100 S.Ct. 1779, 1781 n.1, 64 L.Ed.

² In view of our holding that Board jurisdiction was established at the time the complaint was filed with the Clerk of the Board we need not decide when service upon respondent Jech was effected. However, we find it important to note that, contrary to respondent Jech's belief, service by private courier is appropriate. While the Board's regulations do not specifically mention private courier service as a method of filing, such method falls within the intent of the regulations which provide for service by personal delivery, facsimile or mail. 5 C.F.R. § 1201.22(d).

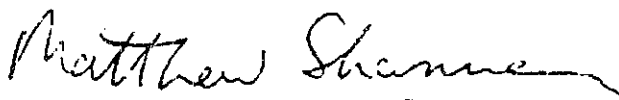
425 (1980). Jurisdiction once established is not lost by a subsequent change in citizenship. *Hawes v. Club Ecuestre El Comandante*, 598 F.2d 698, 701 (1st Cir. 1979). Therefore, by analogy, respondent's retirement, following the filing of the complaint with the Board does not divest the Board of jurisdiction.

While respondent Jech argues that the "plain words" of the statute require that the individual to whom the complaint is presented be an employee, this interpretation overlooks the context in which the term "employee" is used in various parts of the statute. If, as respondent Jech contends, only those currently employed by the government can be considered an "employee" within the meaning of section 1215, absurd results follow. For example, a government employee who retired or resigned during the Board proceedings would not be entitled to the procedural protections of 5 U.S.C. § 1215(a)(2). Further, one who left government before the Board issued a final decision could not file an appeal with the Federal Circuit because only an "employee" may do so under section 1215(a)(4) of title 5. Accordingly, respondent Jech's literal interpretation which could bring about an unreasonable result must be rejected. *Rosado v. Wyman*, 397 U.S. 397, 415, 80 S.Ct. 1207, 1219 (1970); *Grand Light & Supply Co., Inc. v. Honeywell, Inc.*, 771 F.2d 672, 677 (2d Cir. 1985). Furthermore, respondent Jech's reading of the statute would seem to require a finding that the Board loses jurisdiction over a case the

moment the respondent leaves government service. Such a result is contrary to our case law. See *Special Counsel v. Zimmerman*, 36 M.S.P.R. 274 (1988); *Special Counsel v. Filiberti*, 33 M.S.P.R. 186 (1987). It also appears inconsistent with the statute itself which provides for the penalty of debarment, a penalty only appropriate where the respondent has left government. 5 U.S.C. § 1215(a)(3). Finally, nothing in the legislative history of the Civil Service Reform Act indicates that the Board's interpretation of 5 U.S.C. § 1215 is incorrect. See generally H.R. 11280, 95th Cong., 2d Sess. reprinted in 1 Legislative History of the Civil Service Reform Act of 1978 at 12-13, 521; H. Conf. Rep. No. 1717, 95th Cong., 2d Sess. (1978) reprinted in II Leg. Hist. at 1843-2002 (1979). Accordingly, we find that the Board has jurisdiction to adjudicate the complaint.

FOR THE BOARD:

Washington, D.C.


for Robert E. Taylor
Clerk of the Board